Supreme Court, U.S.
FILED
JUN 3 1993
OFFICE OF THE CLERK

No. 92-1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE PITTSTON COMPANY, *et al.*,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA
1974 PENSION TRUST, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

This petition from an interlocutory judgment of the Court of Appeals raises no issue worthy of the Court's attention. The only question it presents is whether summary judgment was correctly granted on a straightforward issue of contract interpretation. The evergreen clause, the contract provision at issue, was negotiated between the United Mine Workers of America ("UMWA") and a multiemployer association, the Bituminous Coal Operators Association ("BCOA"). It provides that each signatory employer is required to "mak[e] the contributions [to multiemployer pension and health benefit trusts] required under the [industrywide collective bargaining

agreement], as amended from time to time, *and any successor agreements thereto* . . . . " 984 F.2d at 471-72 n.1 (emphasis supplied). The district court found, and the Court of Appeals agreed, that there was no genuine dispute of material fact as to the meaning of this contract provision: the provision means "that participating employers . . . were bound to make continuing contributions to the trusts, and that the amounts of contributions would be specified in future [industrywide collective bargaining agreements]." 984 F.2d at 472. On that basis, the district court granted summary judgment to the plaintiff Trusts and against petitioners, The Pittston Company, *et al.* ("Pittston"), and the Court of Appeals affirmed that judgment.[1]

As we show in part I below, the first question presented by the petition rests on a misrepresentation of the decision below. Petitioners' agreement to a continuing obligation to make contributions to pension and health benefit trusts was an *exercise*

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[1] The respondents in this case are four multiemployer benefit trusts which provide pension and health benefits to retired and disabled coal miners and their families (hereafter "Trusts"). Effective February 1, 1993, while this case was pending in the Court of Appeals, the two respondent health benefits Trusts were merged into the United Mine Workers of America Combined Benefit Trust, an entity whose creation was mandated by the Coal Industry Retiree Health Benefit Act of 1992. *See* Subtitle C of the Energy Policy Act of 1992, H.R. 776, 102nd Cong., 2d Sess. (1992). At an appropriate time, the Trusts will file in the district court a motion requesting that the court substitute the Combined Benefit Trust for the plaintiff health benefit Trusts.

That 1992 Act is designed to secure the future funding of the health benefits that were provided by two of the four respondent Trusts. And although the Act does not affect the two health benefit Trusts' claims against Pittston and other employers for the period prior to February 1, 1993, payments under the Act will substitute for any contributions to those two Trusts under future National Bituminous Coal Wage Agreements ("NBCWAs").

of petitioners' right to bargain, not—any more than any contractual commitment—a waiver of any bargaining right. Moreover, as this Court has held in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), the obligation to contribute to a multiemployer trust does not imply an obligation to be part of a multiemployer bargaining unit.

In part II below, we show that the second question presented by the petition raises no issue as to the applicable legal standard for determining motions for summary judgment. Petitioners claim only that the courts below misapplied the generally accepted legal standard. That claim of misapplication is not worthy of this Court's plenary consideration, and is based, moreover, upon a series of gross distortions of the record.

In part III below, we show that the third question presented by the petition is simply not raised in this case. The doctrine of judicial estoppel is not applicable where, as here, the parties and the claims were different in the earlier litigation that is relied upon for estoppel.

Certiorari should be denied.

REASONS THAT THE PETITION SHOULD BE DENIED

I. THE ALLEGED WAIVER OF PITTSTON'S STATUTORY RIGHT TO BARGAIN

a. Pittston asserts that this case would allow the Court to decide "whether an employer's right to select its own bargaining representative may be waived without the showing of a 'clear and unmistakable' intent to waive that right," citing *Metropolitan Edison v. NLRB*, 460 U.S. 693, 705 (1983). There is no such issue in this case.

The premise of petitioners' first question—that the evergreen clause is a *waiver*—is false. In a long line of decisions, the D.C. Circuit has warned against confusing a *waiver* of statutory rights—which occurs when a party "knowingly and voluntarily relinquishes its right to bargain about a matter"—with an *agreement* that "fixes the parties' rights and forecloses further mandatory bargaining." *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991).[2] Where the parties to a collective bargaining agreement have agreed on rules that will govern their conduct, they have *exercised* their bargaining rights as to those rules, and the legal standards for finding a waiver of bargaining rights do not apply. Thus, the D.C. Circuit correctly rejected Pittston's argument that the evergreen clause constitutes a "waiver" of bargaining rights which must be "clear and unmistakable" to be enforced:

> "[T]o the extent that a bargain resolves any issues, it removes that issue *pro tanto* from the range of bargaining." Here, the UMWA and the BCOA agreed on a basis for determining the employers' pension fund contributions. When [Pittston and other employers] signed onto the applicable agreements, they bound themselves to abide by the agreed-upon contribution rates into the future. This was a valid exercise of bargaining rights, and the agreement reached by the parties is fully enforceable against [Pittston]. There is no issue of waiver in this case.

Id. at 479 (citation omitted). *Accord Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992) ("'where the con-

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[2] *See also Connors v. Link Coal Co.*, 970 F.2d 902, 905 (D.C. Cir. 1992); *Department of the Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992); *United Mine Workers of Am., Dist. 31 v. NLRB*, 879 F.2d 939, 943-44 (D.C. Cir. 1989).

tract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say that the union has 'waived' its statutory right to bargain; rather, the contract will control'") (quoting *Local Union No. 47 v. NLRB*, 927 F.2d 635, 641 (D.C. Cir. 1991)).

The evergreen clause is a contractual obligation which continues as long as—but *only* as long as—the BCOA and the UMWA set national contribution rates for the Trusts. The precise extent of the evergreen obligation is pegged to the contribution rates agreed to in future NBCWAs. The use of a general industry standard for uniform contribution rates for multiemployer benefit plans is entirely commonplace in collective bargaining agreements.

We are aware of no authority supporting the proposition that a contractual obligation of this nature should be treated as a waiver of the right to bargain. Indeed, there are numerous cases in which courts have enforced employers' collectively-bargained obligations to provide retirees with lifetime pension and health benefits—obligations as long-term and potentially open-ended as those created by the evergreen clause[3]—and in none of these cases has the court ever analyzed the contractual obligation as a waiver.

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[3] *See, e.g., Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Keffer v. H.K. Porter Co.*, 872 F.2d 60 (4th Cir. 1989); *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984). The evergreen clause is unique in that employers undertake a long-term obligation to make specified *contributions* while, in most industries, employers enter into long-term contractual commitments to provide specified *benefits*. But there is no reason that federal labor policy would favor enforcement of the latter while disqualifying the former.

b. In any event, this question does not merit this Court's review. It is fully disposed of by this Court's decision in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), which Pittston tries vainly to distinguish. In *Amax*, a case involving the same multiemployer funds as those at issue here, the Court rejected employer arguments that are closely analogous to those Pittston makes here. The employer argued that when the UMWA went on strike over a demand that the employer agree to participate in these multiemployer funds, it violated the Section 8(b)(1)(B) prohibition against "coerc[ion of] . . . an employer in the selection of his representatives for the purposes of collective bargaining," 29 U.S.C. § 158(b)(i)(B). *See* 453 U.S. at 326-27. This Court rejected that contention, explaining that participation in a multiemployer trust fund is not the same thing as participation in multiemployer bargaining. *Id.* at 334-38.

Pittston says that the *Amax* decision was based on the conclusion that trustees do not bargain. Petition at 17 n.11. But the Court's rationale was far broader. The Court concluded that very different federal labor policies apply to multiemployer trust funds and multiemployer bargaining:

> Congress enacted § 8(b)(1)(B) largely to prevent unions from forcing employers to join multiemployer bargaining units, or to dictate the identity of those who would represent employers in collective-bargaining negotiations or the settlement of employee grievances. . . . *However, the power of a union to strike or bargain to impasse to induce an employer to contribute to a multiemployer trust fund does not pose the danger Congress sought to prevent. Congress treated the issues of multiemployer bargaining units and multiemployer trust funds quite distinctly.* It is permissible under the law, and may be in the interest of the public, for an employer to bargain separately with a union, independently of any industrywide employer association,

> while the union exerts economic pressure to obtain protection for the employees through the medium of a multiemployer benefit fund.

Id. at 334-35 (emphasis supplied).

If union pressure to contribute to a multiemployer benefit trust does not constitute pressure to join or continue multiemployer bargaining, it necessarily follows that the contract binding Pittston to continue to participate in a multiemployer trust is not equivalent to a perpetual designation of BCOA as its agent for multiemployer bargaining or a waiver of Pittston's right to negotiate separately. For this additional reason, the first question presented does not merit this Court's review.

c. Pittston's effort to manufacture a conflict with respect to this issue is similarly unavailing. There is no conflict among the circuits with respect to whether the D.C. Circuit's distinction between a waiver and an exercise of bargaining rights is correct. The D.C. Circuit and the Seventh Circuit are the only circuits to have directly addressed this question, and they are in accord. *See supra* at 4-5.[4]

Similarly, Pittston's effort to interest the Court in this issue by suggesting that the case would allow the Court to settle the question whether the "clear and unmistakable" standard applies to waivers by *employers* as well as waivers by *employees* is a red herring. Petition at 16. There is no conflict among the circuits on this question, which was not addressed by the courts

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[4] The Eleventh Circuit, too, has observed that the question whether a party has "waived" its right to bargain about an issue is entirely distinct from the question whether an issue is "covered" by a collective bargaining agreement. *See Mead Corp. v. NLRB*, 697 F.2d 1013, 1020 (11th Cir. 1983).

below and which, in any event, we have already shown is not presented by this case.[5]

II. THE PROPRIETY OF SUMMARY JUDGMENT

In affirming summary judgment for the Trusts, the Court of Appeals applied the well settled principles governing summary judgment set forth by this Court in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986)—to wit, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. "If the evidence [of the party opposing summary judgment] is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted).[6]

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[5] Even if Pittston were correct—which it is not—that the evergreen clause waives bargaining rights and that there is a conflict among the circuits with regard to the applicable standard for determining whether a waiver has occurred, this case would not merit the Court's review. The record of this case plainly demonstrates that Pittston's alleged waiver of its statutory bargaining rights was "clear and unmistakable." *E.g.*, 984 F.2d at 475-76 ("the Trustees provided the District Court with a compelling argument and specific evidence indicating that theirs was the only reasonable interpretation of the evergreen clause and that no material factual dispute remained for trial"). Thus, the result in this case would not change even if the waiver standard were applied.

[6] Although the Court of Appeals did not directly cite *Liberty Lobby*, it cited an earlier decision that specifically relied on that case, *see* 984 F.2d at 473; *Farmland Indus., Inc. v. Grain Bd. of Iraq*, 904 F.2d 732, 735-36 (D.C. Cir. 1990).

Pittston argues that the district court improperly "weighed" the evidence in granting summary judgment for the Trusts. However, Pittston simply fails to mention that, in denying the defendant employers' motion for reconsideration of the decision granting summary judgment to the Trusts, the district court explained its earlier comment that the Trusts' evidence

The Court of Appeals' application of that standard presents no issue worthy of this Court's review. The court first held that the "language of the relevant provisions in the applicable trust and collective bargaining agreements unambiguously obliges signatory employers to contribute to the trusts at the rates specified in the current NBCWA, irrespective of the employer's failure to sign that NBCWA." 984 F.2d at 473.[7] The court further held that this interpretation of the clause was "corroborated by voluminous extrinsic evidence submitted by the Trustees," *id.* at 474. The court specifically referred to:

"greatly outweighed" that of the defendants:

> [I]n cases where extrinsic evidence is "so clear that it cannot fairly be said that the material issue of intent is genuinely in dispute," summary disposition is appropriate.
>
> In this case, the Court concluded, after reviewing the voluminous evidence submitted by the Trusts, that the only reasonable interpretation of the evergreen clause is that it was intended to create a continuing obligation to contribute.

App. 63 (citation omitted).

[7] This is the evergreen clause that was part of Pittston's agreement in 1984:

> Any employer who employed any participant eligible for coverage under, or who received or receives benefits under, the 1950 Pension Plan, or any Employer who was or is required to make, or who has made or makes contributions to the 1950 Pension Plan and Trust, is obligated and required to comply with the terms and conditions of the 1950 Pension Plan and Trust, as amended from time to time, including, but not limited to, *making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements thereto, including but not limited to, the National Bituminous Coal Wage Agreement of 1984.* [Emphasis supplied]

> —"the sworn declarations of five people who were directly involved in the negotiations that led to the inclusion of the evergreen clause in the 1978 trust documents," *id.*;
>
> —"copies of notes and minutes prepared contemporaneously with those negotiations which indicate an intention to create a continuing obligation," *id.*;
>
> —"various BCOA and UMWA documents prepared shortly after the negotiations were concluded," *id.*; and
>
> —"public statements made by negotiators of the evergreen clause which confirmed the Trustees' posited interpretation. *See, e.g., Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Subcomm. on Educ. and Labor*, 96th Cong., 1st Sess. 418 (1979) (statement of Donald Pierce, economist, UMWA)." *Id.*

The court concluded:

> Thus, not only is the language of the evergreen clause clear in its effect of permanently binding signatory employers to the contribution rates established in current NBCWAs, but it appears that negotiators on *both* sides of the bargaining table at the 1978 negotiations understood the import of that language.

Id. (emphasis supplied).

Pittston seriously distorts the record when it asserts: "At no time during the ten years between the 1978 NBCWA and the filing of this lawsuit had anyone ever made any reference to the so-called evergreen clause . . . ." Petition at 5. The record contains the *1979* testimony before Congress of Donald Pierce, a key UMWA negotiator, Pierce's *1981* affidavit before

the National Labor Relations Board in a case in which the UMWA asserted that the evergreen clause required continuing contributions after contract expiration, and the *1979* report of yet another UMWA negotiator to the President's Commission on Coal, as well as internal BCOA memoranda prepared within a few months after the 1978 negotiations were concluded. Those documents describe the clause on which the present case depends, as well as the intent to create continuing liability for uniform contributions to the Trusts.[8]

Pittston's repeated assertions that it presented "substantial evidence" supporting its interpretation of the evergreen clause, *e.g.*, Petition at 6, is simply false. As the Court of Appeals stated, "[c]onfronted with [the Trusts'] well supported motion for summary judgment, [Pittston] w[as] able to respond only with a counter-intuitive reading of the pertinent language and references to the Trustees' failure to previously enforce the perpetual obligations explicit in the contractual provisions." 984 F.2d at 475. The Court of Appeals correctly held that the Trusts' previous enforcement of withdrawal liability, rather than the evergreen clause, against certain employers who ceased to make contributions to the Trusts was not evidence of the *intent* of the evergreen clause "since the legal basis for withdrawal liability does not turn upon the [evergreen clause]" and "[s]ince the evergreen clause was not litigated in the with-

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[8] The Court may also note that Pittston's innuendo that Donald Pierce's affidavit in support of the Trusts' interpretation of the evergreen clause was simply the creation of counsel, *see* Petition at 20, is belied by Mr. Pierce's 1979 testimony before Congress, *see* J.A. 566-67, and his 1981 affidavit to the National Labor Relations Board, *see* J.A. 567, 585. In addition, Pittston's assertion that Pierce made a remark in 1988 that was inconsistent with his later (and earlier) sworn statements is untrue. *See* Petition at 7-8, 20. Pierce's 1988 remark did not address the *meaning* of the evergreen clause, but only legal questions as to whether it would be *enforced*. J.A. 1123.

drawal liability cases. . . ." *Id.* at 475 & n.10.[9]

The remaining evidence that Pittston relies on in its petition was—as it concedes—submitted to the district court only *after* summary judgment was granted, in support of a motion for reconsideration. *See* Petition at 8. Pittston does not mention that the district court declined to consider that belated evidence. *See* App. 61. The Court of Appeals affirmed on that point, however, holding that the district court did not abuse its discretion in denying the motion for reconsideration based on defendants' failure to offer this evidence before judgment was entered. 984 F.2d at 476-77. That ruling presents no issue for this Court's review, and the belated evidence should not be considered here.[10]

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[9] Pittston also relies on a provision added to the *1988* NBCWA which provided for contractual withdrawal liability to the benefit Trusts if employers ceased to be obligated to contribute to those Trusts. But, as the Court of Appeals stated, this provision applies only if the employer is not "otherwise obligated to contribute to the funds (*e.g.*, no new NBCWA is enacted); it does not imply that the drafters of the 1988 agreements understood that employers have the right to terminate their obligations." 984 F.2d at 475 n.8. And, in any event, "the understanding of the drafters of the 1988 NBCWA is immaterial for the purpose of divining the intent of the drafters of the 1978 NBCWA." *Id.*

[10] The Court of Appeals also stated that, "even if we were to consider the material belatedly offered by Rawl, we would still conclude that the District Court did not abuse its discretion by refusing to reconsider its judgment. A party opposing summary judgment, when faced with specific evidence that demonstrates the absence of a material factual dispute, cannot defeat the motion simply by offering general denials. Here none of the affidavits or declarations submitted in conjunction with the motion for reconsideration were of persons who negotiated or drafted the evergreen clause." *Id.*; *see also* 984 F.2d at 474.

III. JUDICIAL ESTOPPEL

This case does not present an occasion for this Court to resolve any differences among the courts of appeals on the doctrine of judicial estoppel. As petitioners concede, both courts below declined to apply that doctrine. Petition at 26. Although Pittston argues that the courts *should* have applied it, there is no conflict among the circuits on that question.

The Court of Appeals noted that, because the evergreen clause was never at issue in any of the withdrawal liability cases on which Pittston based its estoppel arguments, the Trusts had not "contradict[ed] earlier sworn statements or present[ed] conflicting interpretations of the evergreen clause to successive tribunals." 984 F.2d at 477. All that had happened, the court said, was that "the Trustees have simply asserted alternative grounds for recovery against different litigants based on different sets of facts." *Id.* No case that Pittston has cited—and no case of which we are aware—has applied the doctrine of judicial estoppel in remotely similar circumstances. Every circuit that applies the doctrine of judicial estoppel applies it not to bar litigants from urging different, even "logically inconsistent," positions in cases involving unrelated parties, *see* Petition at 27 n.18, but instead to bar inconsistent representations with respect to the same facts or claims.

The cases from the Third and Seventh Circuits on which Pittston relies to intimate that there is a conflict between the circuits on this issue are good examples of *our point*. They provide no evidence, as Pittston would have it, that the result in Pittston's case would have been different in one of those circuits. In *Delgrosso v. Spang & Co.*, 903 F.2d 234, 241-42 (3d Cir.), *cert. denied*, 498 U.S. 967 (1990), an employer made inconsistent factual representations in the same proceed-

ing about the source of surplus funds in its pension plan. In *Kale v. Obuchowski*, 985 F.2d 360, 361-62 (7th Cir. 1993), the court ruled that a party in a bankruptcy case could not assert an interest in an industrial park when he had testified in a prior divorce proceeding that he had no interest in that property. And in *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1548-49 (7th Cir. 1990), the court of appeals held that the purchaser of a business, having prevailed on a claim that the former manager had competed against the business prior to the sale without the seller's knowledge or authorization, could not then prevail in a separate suit for fraud based on allegations that the seller had wrongfully failed to disclose the fact of the manager's competition—which it both knew about and had authorized.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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